

LAW ENFORCEMENT AT INDONESIAN WATERS: *BAKAMLA VS. SEA AND COAST GUARD*

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Abstract

This paper aims to analyze Indonesian laws regarding law enforcement in Indonesian waters. Specifically, it analyzes the authority of Badan Keamanan Laut (BAKAMLA) and Indonesian Sea and Coast Guard under the Indonesian Act Number 32 the Year 2014 on the Ocean Affairs Act and Indonesian Act Number 17 the Year 2008 on Navigation Act, respectively. It is argued that the state's sovereignty over the ocean differs from the state's sovereignty over the land territory. This is because according to the United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982), the state's ocean territory is divided into various maritime zones, over which different regimes applied. It is submitted that the farther ocean space is from the land territory, the sovereignty of the coastal state is lessened. Thus, different treatment, especially concerning law enforcement is needed this paper recommends a model for law enforcement at sea, which considers different regimes over different maritime zones as provided within the UNCLOS 1982. It is submitted that while it is fine to have more than one institution having the authority of law enforcement at sea, the extent of such authorization should be clarified.

Keywords : law enforcement, BAKAMLA, sea and coast guard, Indonesia, ocean affairs.

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I. INTRODUCTION

Located in a very strategic geographic location, that is between two massive areas of the ocean, Indian and the Pacific Ocean; and between two continents, Asia and Australia, Indonesia is benefited, especially from an economic perspective concerning shipping activities through the Indonesian waters. However, such advantages also made Indonesian waters very vulnerable, especially to maritime security threats.¹ Having a mass area of waters, Indonesia as the legal proponent of the concept of an archipelagic state,² also claim itself as an archipelagic state to maintain the unity of its land and waters territory as

¹ See, further Dhiana Puspitawati, Lowell Bautista, Adi Kusumaningrum, Yasniar Rachmawati, and Patricia Isabella, "International Legal Implications of Archipelagic State Status on Maritime Security in Southeast Asia (A Comparison of the Practice of Indonesia and the Philippines)", (Joint Research Report, Universitas Brawijaya and University of Wollongong, 2013).

² The acceptance of the concept of an archipelagic state has undergone everlasting discussions until it finally envisages in Part IV of UNCLOS 1982 and thus known as the archipelagic state principles, see also Kevin Baumert, Brian Melchior, "The Practice of Archipelagic States: A study of Studies", *Ocean Development & International Law* 46, No. 1, (2015): 61-62

emphasized within the purpose of Indonesia.³ As such, Indonesia is not only having status as an archipelagic state, the country is also considered as the biggest archipelagic state in the world.⁴ This way, Indonesia should balance the security of its waters territory while still allowing international navigation passing through its archipelago safely.

The status of an archipelagic state brings legal consequences for Indonesia, i.e. the state's authority to manage and control its ocean territory following the provision of the United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982). The crucial part of managing and controlling the mass areas of the ocean lies on the law enforcement aspect. UNCLOS 1982 divides ocean management into two broad categories, which include ocean space over which a coastal state/ an archipelagic state may exercise its sovereignty and those ocean space in which only sovereign rights can be exercised by a coastal state/ an archipelagic state. This way, it is submitted that unlike the state's sovereignty over a land territory, the state's sovereignty over the ocean, however, is not unlimited. Such sovereignty is limited by the existence of other states' rights relating to the peaceful usage of the ocean.⁵ UNCLOS 1982 further regulates various maritime zones under the authority of coastal states.⁶ There are also certain regulations over each of those maritime zones with regard to what extent the authority of coastal states can be exercised. Principally, the further the ocean space is from the coast, the less sovereignty can be exercised by coastal states and/ archipelagic states. Such sovereignty should also consider existing rights of other states over the ocean.⁷ Thus, the discussions between state's sovereignty over the land territory and those over the ocean space is different.

Since the authority of coastal states and/ archipelagic states is different over each of the maritime zones, consequently, the law enforcement will be different. Indonesian Act number 6 Year 1996 regarding Indonesian Waters (hereinafter Indonesian Waters Act), in accordance with UNCLOS 1982 divides ocean management into two broad categories, which include Indonesian waters (for ocean spaces over which state's sovereignty can be exercised) dan waters under Indonesian jurisdiction (for ocean spaces over which only sov-

³ This claim is clearly stated in Indonesian Constitution stating that Indonesia is an archipelagic state. Further national regulation on this can be found in Indonesian Act Number 6 Year 1996 on Indonesian Waters.

⁴ A. Kadar, "Pengelolaan Kemaritiman Menuju Indonesia sebagai Poros Maritim Dunia [Maritime Management Towards Indonesia as a World Maritime Axis]", *Jurnal Keamanan Nasional* 1, no. 3 (2015): 441.

⁵ UNCLOS 1982 is known as *quid pro quo* convention, which balance conflicting interests of states, especially between coastal states and user maritime states over the usage of the ocean space.

⁶ Randal Walker, "International Law of the Sea: Applying the Doctrine of Hot Pursuit in the 21st Century", *Auckland University Law Review* 17, (2011): 196.

⁷ Dhiana Puspitawati, *Hukum Laut Internasional [International Law of the Sea]*, (Jakarta: Prenada Media, 2018).

oreign rights can be exercised). Article 4 of Indonesian Waters Act regulates:

*“The sovereignty of the Republic of Indonesia over Indonesian Waters includes internal waters, archipelagic waters, territorial waters and air-space over those waters and the seabed beneath along with natural resources contained therein.”*⁸

Furthermore, waters under Indonesian jurisdiction include contiguous zone, exclusive economic zone (EEZ) and continental shelf. Beyond those, there is high seas, over which no state’s jurisdiction can be established, except for flag states’ in relation to floating islands principles.⁹

This research focuses in law enforcement over the ocean spaces, over which Indonesia can exercise its sovereignty. Thus, only ocean spaces up to 12 nautical miles from the baselines is considered. With regard to law enforcement, Article 24 of Indonesian Waters Act provides:

*“The enforcement of sovereignty and law over Indonesian waters, air space above, land and seabed beneath including natural resources contained therein, as well as the sanction upon its violation, is implemented in accordance with existing international laws as well as others existing laws and regulations.”*¹⁰

Traditionally, both international as well as national laws recognizes the authority of Navy as the competent law enforcement institution for law enforcement at sea.¹¹ The authority of navy as law enforcement institution at sea includes the authority as investigator at sea. In addition, such authority is not limited to certain maritime zones, but applicable in all maritime zones. This is because the existence of warship as a recognized state’s ships is clearly stated within the provisions of UNCLOS 1982. However, since there are various maritime threats exist in Indonesia waters and due to the mass areas of waters fall within Indonesia’s sovereignty as well as jurisdiction, there are others national institutions having the authority as law enforcement institution at sea. These institutions include Ocean Security Agency of known as *Badan Keamanan Laut* (hereinafter as *BAKAMLA*) and *Penjaga Laut dan Pantai* (Sea and Coast Guard). These law enforcement institutions were established under different legal instruments. The establishment of *BAKAMLA* was provided by

⁸ Indonesia. *Undang-Undang tentang Perairan Indonesia*, UU No. 6 Tahun 1996. (*Law on Indonesian Waters*. Law No 6 Years 1996). Art 4.

⁹ Floating Islands principles is the recognition of prolonged state’s territory over vessels and aircrafts flying its flag.

¹⁰ Law on Indonesian Waters, art. 2.

¹¹ See TNI AL “Keamanan Laut [Maritime Security],” (paper presented in Guest Lecture Law Faculty, Universitas Brawijaya, Malang, 19 March 2014).

Indonesian Act on Ocean Affairs, Indonesian Act Number 32 Year 2014 concerning Ocean Affairs (hereinafter as Ocean Act). Article 59 (3) of Ocean Act provides:

“In order to enforce the law at Indonesian waters and waters under the jurisdiction of Indonesia, especially in the establishment of security and safety patrol over those waters, BAKAMLA was formed.”

Whereas the Indonesian Sea and Coast Guard was established under the Indonesian Act Number 17 Year 2008 concerning Navigation (Navigation Act). As provided in Article 276 (1) of Navigation Act as follows:

“(1) in the establishment of safety and security over the ocean, the guardian as well as law enforcement function were conducted.

(2) the establishment of above-mentioned function was implemented by Indonesian Sea and Coast Guard”

It can be noticed from the above that there is overlapping norms between Ocean Act and Navigation Act concerning law enforcement as well as patrol function over Indonesian Waters. Such overlapping norms might cause conflict in their application. Thus, legal analyzes of each authority of *BAKAMLA* and Sea and Coast Guard is needed. This research analyses such overlapping norms by identifying *ratio legis* of those provisions. It recommends model for law enforcement at sea, which consider different regimes over different maritime zones as provided within the UNCLOS 1982.

II. STATE’S JURISDICTION OVER THE OCEAN AND OTHER STATES’ RIGHTS

UNCLOS 1982 divides ocean space of a coastal state into two broad categories. These include ocean space over which coastal states might exercise their sovereignty and those over which coastal states might only exercise their sovereign rights. The first category, ocean space over which coastal states may exercise their sovereignty includes internal waters,¹² archipelagic waters (only for an archipelagic states)¹³ and territorial waters.¹⁴ The application of full sovereignty, however, only exists over the internal waters. Consequently, there is no rights of passage of foreign ships over the internal waters, unless authority from coastal states is given. Whereas in territorial sea, that is the maximum

¹² UNCLOS, art. 8

¹³ UNCLOS, art. 49.

¹⁴ UNCLOS, art 3 and 4.

of 12 nautical miles from the baselines,¹⁵ the sovereignty of coastal states is limited to the existing innocent passage rights of foreign ships.¹⁶ As over the archipelagic waters of archipelagic state, the sovereignty of archipelagic states is limited to the existence of the rights of archipelagic sea lanes and innocent passage of foreign vessels. While archipelagic sea lanes passage can be exercised over designated sea lanes, innocent passage can be exercised in other part of archipelagic waters, other than the designated sea lanes. Indonesian Act Number 6 Year 1996 on Indonesian Waters termed ocean spaces over which coastal states might exercise their sovereignty, as ‘*Perairan Indonesia*’ or ‘Indonesian Waters’ as envisages in Article 3 of Indonesian Waters Act.¹⁷ Furthermore Article 4 of Indonesian Waters Act envisages as follows:

“The sovereignty of the Republic of Indonesia includes territorial sea, archipelagic waters and internal waters as well as the air space above the territorial sea, archipelagic waters and internal waters and the seabed and subsoil as well as natural resources contained therein.”

The second category of ocean space, over which coastal states might only exercise their sovereign rights,¹⁸ includes contiguous zone,¹⁹ exclusive economic zone (EEZ),²⁰ and continental shelf.²¹ Beyond EEZ, there is high seas, over which no state jurisdiction can be established, except under the floating islands or flag state principles.²² Since this paper only focuses in the first category of ocean space, the second category of ocean space will not be discussed.

Furthermore, while coastal states’ sovereignty as well as sovereign rights are recognized, however, over both ocean spaces categories, other states’

¹⁵ UNCLOS, art. 2. , See further Robert Beckman, “The UN Convention on The Law of The Sea and The Maritime Dispute in The South China Sea”, *The American Journal of International Law* 107, no 1, (2013):145

¹⁶ Chelsea Purvis, “Coastal State Jurisdiction Under UNCLOS: The *Shen Neng 1* Grounding on The Great Barrier Reef”, *The Yale Journal of International Law* 36, no 207, (2011):210

¹⁷ Law on Indonesian Waters, art 3. stated that Indonesian Waters include internal waters, archipelagic waters and territorial seas.

¹⁸ Sovereign rights can be defined as an exclusive right posed by coastal State to exercise its specific laws and regulations only in certain matter.

¹⁹ UNCLOS, art 33(1) provides that in contiguous zone, coastal states any exercise control to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.

²⁰ UNCLOS, art 56(1)(a) stated that sovereign rights of coastal State in EEZ is sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.

²¹ UNCLOS, art 77(1) stated that the Coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

²² Floating islands principle is extension of the territory of a state on ships or aircraft bearing the flag of the state.

rights exist. Although coastal states' sovereignty over the internal waters is identical to the sovereignty over the land territory, it does not mean foreign ships cannot enter the port.²³ Such ships may exercise passage and proceed to the port with the authority of coastal states. In other words, permit is strictly required to enter internal waters. In territorial sea, as mentioned previously, foreign ships are allowed to exercise the rights of innocent passage without coastal states' authority. However, in exercising the rights of innocent passage, foreign ships should strictly obey the provisions envisaged in Article 19 paragraph 1 of UNCLOS 1982. This Article defines innocent passage as "...so long it is not prejudicial to the peace, good order or security of the coastal State." This Article further requires that such passage shall be done in conformity with UNCLOS 1982 and other rules of international law. Detail criteria as to what is considered as not prejudicial to the peace and good order or security of coastal State can be found in paragraph 2 of the same article.²⁴ In addition to innocent passage, other states' rights of navigation include the rights of archipelagic sea lanes, which can be exercised over the designated sea lanes over the archipelagic waters, as envisaged in Part IV of UNCLOS 1982.

In the second category of ocean space, the rights of other states include the rights of freedom of navigation and overflight and the right of access to the natural resources contained therein, under certain circumstance. For instance, the rights of access to natural resources contained therein the EEZ can be conducted through prior agreement and cooperation with coastal states. It follows from the above that since there are different arrangement made by UNCLOS 1982 over various maritime zones under the sovereignty and sovereign rights of coastal states, thus the law enforcement mechanism should also be distinguish for every maritime zone. Such law enforcement should also consider other existing rules of international law. The following section will discuss on the national laws concerning Indonesian waters to analyze whether this law has accommodated the provisions envisaged by UNCLOS 1982, especially regarding maritime zones.

III. THE MEANING OF 'INDONESIAN WATERS'

Indonesia ratified UNCLOS 1982 through Indonesian Act Number 17 Year 1985 on the Ratification of UNCLOS 1982. The Act should have been further followed by Ocean Affairs Act, which will be function as umbrella Act

²³ Maria Maya Lestari, "Study of The Right of Foreign Ship Against State Sovereignty (Case Study Indonesia)", *Indonesia Journal of International Law* 14 no 4, (2017) :503

²⁴ UNCLOS, art 19(2).

upon further Acts concerning the use of the ocean. However, Indonesia has just declared its Ocean Affairs Act in 2014 through Indonesian Act Number 32 Year 2014 on Ocean Affairs. Yet, it did not stop Indonesia in implementing the provisions of UNCLOS 1982, especially with regard to archipelagic State. Such implementation has been done through various Acts which were declared after the entry into force of UNCLOS 1982 in 1994. One of national Act relevant with this paper is Indonesian Act Number 6 Year 1996 on Indonesian Waters (Act of Indonesian Waters).

Indonesian Waters Act adopts the provisions of UNCLOS 1982 especially on the first category of ocean space, that is ocean space under the sovereignty of Indonesia. It further provides provisions on other States' rights over such ocean space, as discussed at the beginning of this paper. The Act also re-emphasizes the existence of Indonesia as an archipelagic state, as stated in Article 2 of this Act.²⁵ Article 1 paragraph (4) of the Act envisages clearly that "Indonesian waters includes territorial sea, along with its archipelagic waters as well as internal waters."²⁶ The definition of each maritime zones mentioned are further elaborated by Article 3. Article 4 of the Act provides:

"The sovereignty of the Republic of Indonesia extends over the territorial seas, archipelagic waters, internal waters, and the air space over the territorial seas, archipelagic waters, internal waters as well as their seabed and subsoil and the natural resources contained therein."

Similarly, Indonesian Act Number 43 Year 2008 on State Territory also provides that Indonesian Waters include internal waters, archipelagic waters and territorial seas along with the seabed and subsoil as well as the resources contained therein.²⁷ While Article 4 recognizes the sovereignty of Indonesia over those waters, the Act further provides the rights of other States over such waters with regard to the rights of passage and the rights to laydown underwater cables and pipelines.²⁸

²⁵ Article 2 of the Act clearly stated that the Republic of Indonesia is an archipelagic State. The archipelagic State principles emphasizes the unity of land and waters as a single unit. This importance of the unity of Indonesia's land and waters territory is expressly mention in Article 1 paragraph (1) of Indonesian Act Number 43 Year 2008 on State Territory, which provides that State territory, which later known as Indonesia's territory, include land territory, internal waters, archipelagic waters and territorial seas along with seabed and subsoil as well as the resources contained therein.

²⁶ Law on Indonesian Waters, art 1 (4)

²⁷ Article 1 paragraph (1) and (2) of Indonesian Act Number 43 Year 2008 on State Territory. As for the second category of ocean space, this Act provides it in Article 1 paragraph (3) which mention *wilayah yurisdiksi* (jurisdiction) to include territories beyond Indonesia's territory which consists of Exclusive Economic Zone (EEZ), continental shelf and contiguous zone, over which state has sovereign rights and certain authorities as provided by laws and regulations as well as international laws.

²⁸ These include the rights of innocent passage, the rights of archipelagic sea lanes passage and the rights of transit passage. The provisions of these rights are inconformity with the provisions provided by the United

It follows from the above that the meaning of “Indonesian Waters” is clearly include internal waters, archipelagic waters and territorial seas. However, it is crucial to underline that although Indonesia has sovereignty over such waters, the rights of other States should also be recognized and honored. However, in exercising those rights, especially the rights of various passage²⁹ foreign ships and aircraft should strictly obey certain conditions sets up within the UNCLOS 1982. For instance, in exercising the rights of innocent passage, foreign vessels should conduct the rights in accordance with Article 18-21 of UNCLOS 1982.³⁰ Whereas the rights of archipelagic sea lanes passage should be conducted in accordance with Article 53 and 54 of UNCLOS 1982.³¹ As for the rights of transit passage, foreign vessels should act in accordance with Part III of UNCLOS 1982.³² However, such rights, sometimes misused to the illegal acts, such as trafficking, illegal fishing, arms robbery and any other illegal or even unlawful action. For instance, while all the rights of passage should be conducted in continuous, expeditious and should not be prejudicial to the peace, good order or security of the coastal State, some passage were somehow conducted activities listed in Article 19 paragraph (2) of UNCLOS 1982.³³ Upon such infringement of innocent passage rights, Article 25 of UNCLOS 1982 gives coastal State the rights to take necessary steps to suspend and even prevent such passage. This provision represents the sovereignty of coastal State over its territorial sea.

Furthermore, the essential aspect of sovereignty refers to the state’s capability in conducting law enforcement in implementing both national laws as well as international laws.³⁴ Since in Indonesian waters the rights of other

Nations Convention for Law of The Sea 1982.

²⁹ These include the rights of innocent passage, the rights of archipelagic sea lanes passage and the rights of transit passage.

³⁰ Article 18 provides that the meaning of passage includes traversing and proceeding; and that the passage should be continuous and expeditious. In conducting innocent passage foreign vessels should not conduct any activities listed in Article 19 and it that the underwater vehicle should navigate on the surface and showing its flag. If they fail to do so, certain legal implications applied as envisages in Article 25 of United Nations Convention for Law of The Sea 1982

³¹ Article 53 provides rights and obligation of both archipelagic states and foreign vessels exercising the rights of archipelagic sea lanes passage

³² Article 37 of United Nations Convention for Law of The Sea 1982 provides the scope over which transit passage can be exercised with the elaboration further of what constitutes transit passage as provided by Article 38 of UNCLOS 1982.

³³ *Read further* the debate on the passage of Lusitania Expresso in 1992, which might be considered as prejudicial to the peace and security of Indonesia. Another Article that poses different view can be found in Rothwell, Donald R, “Coastal State Sovereignty and Innocent Passage: The Voyage of Lusitania Expresso”, *Marine Policy*, V.16, n. 6, 1992, 427-437.

³⁴ *See further* Malcolm N Shaw, *International Law*, (Cambridge University Press, 7th Ed, 2015); Anthony Anghie, *Imperialism, Sovereignty and The Making of International Law*. (Cambridge University Press, 2004).

States also exist, consequently, in the process of law enforcement, beside national laws, international laws should be considered. In fact, in formulating national laws in relation to the law enforcement at sea, international laws should be referred. In relation to law enforcement and in accordance with Article 25 of UNCLOS 1982, Article 24 of Indonesian Waters Act envisages:

(1) The enforcement of Indonesian sovereignty and law in Indonesian waters, the airspace there above, the seabed and the subsoil, including their natural resources, and the imposition of sanctions for violation of laws and regulations shall be carried out in accordance with the provisions of the Convention, other rules of international law and applicable laws and regulations.

(2) The exercise of jurisdiction and enforcement of sovereignty and law over foreign ships traversing the territorial sea and the Indonesian archipelagic waters shall be carried out in accordance with the provisions of the Convention, other rules of international law and applicable laws and regulations.

(1) Where necessary for the upholding of the law as referred to in paragraph (1) and (2), a coordinating body may be established by Presidential Decree.

The further implementation of Article 24 paragraph (3) will be discussed in due course and be an essential part of this paper. However, before proceeding to that part, it is important to elaborate what kind of threats that could happen in Indonesian Waters, that is the waters under the sovereignty of Indonesia.

IV. THE SCOPE OF SECURITY AND SAFETY

As mentioned earlier that with the limitation of coastal States' sovereignty to other States' rights, the misuse of such rights often posed certain threats to coastal State, in this case Indonesia. While the unity of its land and waters territory is crucial for Indonesia, the country also obliged to honor other States' rights over Indonesian Waters. This way, it becomes important for Indonesia to balance those rights and obligations at the same time. This way, law enforcement at sea holds an important role. As the ocean provides the biggest resources on earth, it is also the most vulnerable to the issue of security as well as safety. It is submitted that maritime threats vary over time and can be classified to threats over maritime security and threats over maritime safety. Security and Safety are in fact have a different scope, but to achieve good order at sea, both

security and safety should be addressed.

Feldt, Roell dan Thiele stated that maritime security is a combination of both preventive and responsive measures to protect maritime domain against any threats and other intentional unlawful act.³⁵ Whereas maritime safety” is “the combination of preventive and responsive measures intended to protect the maritime domain against, and limit the effect of, accidental or natural danger, harm, and damage to environment, risks or loss.” It is therefore submitted that the keywords for maritime security are: preventive and responsive measures, aiming at both law enforcement as a civilian and military requirement and defense operations as a military, in this case naval requirement. Meanwhile, the International Maritime Organization (IMO) draws a distinction between maritime safety and maritime security. The previous refers to preventing or minimizing the occurrences of accidents at sea that may be caused by sub-standard ships, unqualified crew or other operators’ error. Whereas the later refers to the protection against unlawful and deliberate acts conducted at the ocean.³⁶ In sum, The crucial distinction is between man-made and unintentional risks and dangers. In addition, while the term security should be distinguished from the term safety, the term maritime should also be distinguished from the term sea or ocean.

To gain clear understanding of what constitute maritime (*kemaritiman*) and what constitute ocean (*kelautan*), it is usefull to divide the ocean vertically into three parts, which includes surface, middle and bottom. While there are various activities can be conducted on the surface, two broad activities can be identified, those related to navigation and commercial trade as well as those related to territorial claim and state sovereignty. Furthermore, in the middle part, one can look at the exploration and exploitation of natural resources, whereas on the bottom of the ocean one can explore and exploit natural resources, such as oils and various oecal noduls. Thus, it is submitted that kelautan is a term used to discuss matters related to all activities conducted on the ocean, which, inter alia, include state sovereignty and authority, exploration and exploitation of natural resources within the ocean and over the air above as well as marine environment protection. In other words, it focuses on the function of the ocean as the biggest natural resources provider. Whereas maritime (*kemaritiman*) includes navigation, sea-borne trade, port state measures and other activities related to maritime services. To conclude, kemaritiman focuses on the function of the ocean as a mean of transportation and sea-borne

³⁵ Ludtz Feldt, Peter Roell, and Ralph D. Thiele, “Maritime Security: Perspectives for a Comprehensive Approach,” *ISPSW Strategy Series* no. 222 (2013).

³⁶ P.K. Mukherjee and M.Q. Mejia, Jr, “The ISPS Code: Legal and Ergonomic Considerations” in *Contemporary Issues in Maritime Security*, M.Q. Mejia, Jr., eds. (Sweden: World Maritime University, 2003), 33-34.

trade especially international trade as well as all legal implications arises from vessels' operation.

Having described the difference between 'maritime' and 'ocean', however, it is argued that contemporary development on the uses of the ocean requires integrated development between those fall under the 'maritime' scope and those under 'ocean' scope in order to protect maritime domain from intentional unlawful acts. Thus, the term security itself has broaden to include the security of the marine environment and the security of ocean resources availability for mankind, especially for coastal states' nations.

V. *RATIO LEGIS* OF *BAKAMLA* AND SEA AND COAST GUARD'S AUTHORITY IN INDONESIAN WATERS

It follows from the above that both security and safety are crucial to addressed potential maritime threats. Aware of these and as the implementation of Article 24 paragraph (3) of Indonesian Waters Act,³⁷ in 2005 Indonesia declared Presidential Regulation Number 81 Year 2005 on the establishment of Marine Safety Coordinating Board or *Bakorkamla* (previously *BAKAMLA* was called *Bakorkamla*). In fact the regulation on the establishment *Bakorkamla* was firstly introduced in 1972 through *Surat Keputusan Bersama 5 Menteri* or Joint Decree of 5 Ministers, which were Minister of Defense and Security/ Commander of the Armed Forces, Minister of Transportation, Minister of Finance, Minister of Justice and Attorney General No. KEP/B/45/XII/1972; SK/901/M/1972; KEP.779/MK/III/12/1972; J.S.8 /72/1; KEP-085/J.A/12/1972 on the Establishment of Marine Safety Coordinating Board and the Joint Command Operations Marine Safety. Further development on the legal basis of *Bakorkamla* was the declaration of Presidential Regulation Number 81 Year 2005 on Maritime Security Coordinating Board (2005 President Regulation). While one might assume such refreshment was needed due to the changes on governance and development of the strategic environment today, in fact, it should be noted that Article 24 of paragraph (3) of Indonesian Waters Act is clearly envisaged the establishment of a coordinating body in enforcing laws in Indonesian waters. According to Article 3 of 2005 President Regulation the task of *Bakorkamla* was coordinating the formulation of policies and implementing integrated operational activities. Whereas the function of *Bakorkamla* according to Article 4 of the President Regulation were as follows:

- (1) Formulation and enactment of general policies in the field of maritime

³⁷ Article 24 paragraph (3) reads where necessary for the upholding of the law as referred to in paragraph (1) and (2), a coordinating body may be established by Presidential Decree.

security.

- (2) Coordinating activities in the field of maritime security, which includes safeguarding, monitoring, prevention and taking necessary action against any law infringement as well as providing the safety of navigation and securing community's and government's activities in Indonesian waters.
- (3) Giving technical as well as administrative support in maritime security in integrated way.

This way, it can be seen that according to the 2005 Presidential Regulation of *Bakorkamla* do not have law enforcement function, but more to the function of merely coordinating function as well as formulating policies without the power to enforce the policies. At this point it can be questioned whether the 2005 President Regulation was a result of what was mandated by Article 24 paragraph (3) of Indonesian Waters Act? Historical record shows that the enactment of 2005 President regulation was a result of the work of Working Group Development Planning Security and Law Enforcement at Sea, which was established under the Decree of Coordinating Minister for Political and Security Affairs No. KEP.05 / Menko / Polkam / 2/2003. Thus, it is remained unclear whether the mandate Article 24 paragraph (3) of Indonesian Waters Act has ever been implemented yet.

Although Indonesian has ratified UNCLOS 1982 through Indonesian Act number 17 Year 1985 and submitted the document of ratification on the 3rd of February 1986, the enactment of Indonesian Act on Ocean Affairs did not take place until 2014.³⁸ In 2014 Indonesia enacted Act Number 32 Year 2014 on Ocean Affairs (Ocean Affairs Act). Although the enactment of this Act was considered too late, however, it can be seen as a continuous commitment of Indonesian government on ocean affairs. Relevant to this paper, Article 59 paragraph (3) of Ocean Affairs Act provides: "for the purpose of law enforcement over Indonesian waters and jurisdiction, particularly in carrying out security and safety patrols in Indonesian waters and jurisdiction, Maritime Security Agency was established."³⁹ Unlike Indonesian Waters Act, Ocean Affairs Act clearly mention the establishment of Maritime Security Agency (hereinafter refers to *Bakamla*), not only a coordinating body, as mandated by Article 24

³⁸ However, many other ocean related laws have been enacted and operates nationally, especially related to the rights of foreign vessel passage and other UNCLOS 1982 related provisions. For the list of ocean related laws enacted after Indonesia's ratification of UNCLOS 1982 see further Dhiana Puspitawati, *The Implementation of An Archipelagic State Principles in Indonesia*, Ph.D Dissertation, T.C. Beirne Law School, BEL Faculty, the University of Queensland, 2008.

³⁹ Indonesian jurisdiction in this Article means the second category of ocean space referred in this paper by the author.

paragraph (3) of Indonesian Waters Act and thus Article 72 of Ocean Affairs Act clearly declares that Article 24 paragraph (3) of Indonesian Waters Act is revoked. Article 61 of Ocean Affairs Act further specifies the task of *Bakamla* to the patrolling function over Indonesian waters and jurisdiction. This task clearly differs to the task of *Bakorkamla*. However, it is further questionable whether the patrolling function includes law enforcement in relation to investigator at sea? Article 62 further provides the function of *Bakamla* as follows:

- 1) Formulating national policies in maritime security and safety over Indonesian waters and jurisdiction
- 2) Establishing early warning system of security and safety over Indonesian waters and jurisdiction
- 3) Conducting safeguarding, monitoring, prevention and taking necessary action against any law infringements over Indonesian waters and jurisdiction.
- 4) Synergizing and monitoring the implementation of sea patrol of relevant institution
- 5) Giving technical and operational support to relevant institution
- 6) Giving assistance in search and rescue over Indonesian waters and jurisdiction
- 7) Conducting other tasks relating to national defence system

In addition to this, Article 63 paragraph (1) of the Act also envisages that in establishing tasks and function as provides in Article 61 and 62, *Bakamla* is given the authority to:

- 1) Conducting hot-pursuit
- 2) Suspending, inspecting, arresting and handling over the ships to the relevant authorities to carry out further legal proceedings; and
- 3) Integrating information system on maritime security and safety over Indonesian waters and jurisdiction

Paragraph (2) of the same Article further states that the authorities referred to by paragraph (1) should be integrated in one command. Compared to *Bakorkamla* function envisages in Article 4 the 2005 President Regulation, the function of *Bakamla* clearly removes the function in providing the safety of navigation. Furthermore, Article 63 paragraph 1 point 2 is silent on the authority as investigator and hence the function of investigator at sea remains on Indonesian Navy's authority.⁴⁰ The crucial difference between the

⁴⁰ Nazili Abdul Aziz, L. Tri Setyawanto R, and Soekotjo Hardiwinoto, "Kewenangan Badan Keamanan Laut (*BAKAMLA*) dalam Pelaksanaan Pengamanan di Wilayah Perairan Indonesia [The Authority of Indonesian Maritime Security Agency in Indonesian Territorial Waters Custody]," *Diponegoro Law Journal* 5, no. 4, (2016):11.

function and/ or the authority of *Bakorkamla* and *Bakamla*, is that *Bakamla* is not merely have authority in coordinating activities and formulating policies relating to maritime security, but also taking necessary action against any law infringements. In such, it further questionable why both 2005 President Regulation as well as Ocean Affairs Act do not clearly state ‘law enforcement’ (*penegakan hukum*) but rather using the term of ‘necessary action against law infringement’ (*penindakan pelanggaran hukum*)? Although Article 59 paragraph (3) of Ocean Affairs Act clearly states the purpose of *Bakamla*’s establishment is to do law enforcement at sea, Article 63 paragraph (2) of Ocean Affairs Act is silent on the possibility that the function of *Bakamla* as investigator. Article 63 paragraph 2 of the Act further provides that the authority of *Bakamla* among other things is ‘handling over the ships to the relevant authorities to carry out further legal proceedings’. As such, it is argued that *Bakamla* will give the case to Indonesian Navy to carry out further legal proceeding, which refers to investigator function of Indonesian Navy.⁴¹ In addition to this, according to the theory of authority, the authority of an institution is given based on the function of the institution itself.⁴² The function of *Bakamla* in conducting other tasks relating to national defence system do not further elaborates to specific authority and thus causing various interpretations. In sum, *ratio legis* of the authority of *Bakamla*, in fact was to broaden the function of *Bakorkamla* not to merely formulating policies without the capability of executing such policies. However, such authority should also consider existing authority of other relevant institution and rights as well as obligation of Indonesia as coastal State over different maritime zones provided by the UNCLOS 1982.

Moving now, to the Sea and Coast Guard which might be referred to *Kesatuan Penjagaan Laut dan Pantai* (KPLP). Unlike *Bakorkamla*, KPLP has long record of history since the Dutch Government ruled Indonesia.⁴³ After Indonesia’s independence, KPLP which was named as *Jawatan Pelayaran Republik Indonesia* was merged with the Shipping Service of the Republic of Indonesia into the Marine and Coast Guard Service and was placed under the jurisdiction of the Ministry of Transportation. In 31 January 1950 the agency was handed over to Indonesian Navy. However in 1952 the agency was returned to the Ministry of Transportation, while still working together with Indonesian Navy against any illegal state successors activities at that time. After that the agency has undergone tremendous change of regulations. The agency

⁴¹ Indonesia, *Undang-Undang Tentara Republik Indonesia*, No 34 Tahun 2004, (Law on the Indonesia Armies. Law No. 34 Year 2004) art 9.

⁴² Nur Basuki Winanmo, *Penyalahgunaan Wewenang dan Tindak Pidana Korupsi [Power Abuse and Corruption]*, (Yogyakarta: Laksbang Mediatama, 2008): 65.

⁴³ The history of KPLP during the Dutch era will not be discussed in this paper. Read further Indonesian Sea and Coast Guard at https://en.wikipedia.org/wiki/Indonesian_Sea_and_Coast_Guard

was renamed as *Operasi Polisionil di Laut* (ODPIL) and placed under the Directorate of Sea Operations of the Ministry of Transportation. The agency, then undergone the change of name again in 1965 to Assistant Special Operations of Government Transport (AOKAP) based on Ocean Transportation Ministry Decision Number Kab.4 / 9/16/1965. Further the agency changed the name again to the Bureau of Shipping Safety (BKP) in 1966 based on the Decision of the Minister of Transport No. M.14/13/14 Phb dated June 20, 1966 with the task of organizing the Special Police in the Sea and Search and Rescue (SAR). Furthermore, based on the Decision of Maritime Minister: No. Kab.4 / 3/14 dated December 13, 1966 BKP was incorporated into the Operations Unit Command (KASOTOP) which later became the Directorate of Shipping while maintaining Police duties at sea. However, along the merged of the Maritime Department into the Department of Transportation, based on Decision of Minister of Transportation M.b./14/7 Phb dated August 24, 1968, the Special Duties of the SAR was incorporated into the Directorate of Navigation, and by the Minister of Transportation was renamed back to the Marine and Coast Guard with the task of organizing the Special Police in the Sea and the Special Security of the Port. Furthermore, based on the Decision of Minister of Transportation No. KM. 14/U/plib-73 dated 30 January 1973, the agency was renamed to its original name as Sea and Coast Guard (KPLP), which is the agency's present time. While there is no more development on the regulation of the establishment as well as the function of KPLP, Indonesia's President Regulation Number 40 Year 2015 relating to the Ministry of Transportation envisages that Directorate General of Maritime Transportation hold responsibility on all of the activities as well as administrative matters of International Maritime Organization or other international institutions in the field of navigation and/ or shipping.⁴⁴ This is further implemented by two supporting organs, which include Directorate of Shipping and Maritime Affairs (DitKappel) and the Directorate of Sea and Coast Guard (DitKPLP). While DitKappel has the function of flag State control, the DitKPLP has the function of port State and coastal State control.⁴⁵ The latest regulation on Indonesian Sea and Coast Guard can be found in Chapter XVII of Indonesian Act Number 17 Year 2008 relating to Navigation (Navigation Act), which is provided in Article 276 until 281. Article 276 envisages as follows:

- 1) In order to guarantee the safety and security at sea, the function of sea and coast guard as well as law enforcement was established.

⁴⁴ Indonesia. *Peraturan Presiden tentang Kementerian Perhubungan*, Perpres No. 40 Tahun 2015. (*President Regulation on the Ministry of Transportation*, Perpres No. 40 Year 2015). Art. 44.

⁴⁵ Kementerian Perhubungan Republik Indonesia [Ministry of Transportation of Indonesia], "Pembahasan Penanganan Keamanan Laut [Explanation on Handling Maritime Security]," (paper presented in Minister level Coordination, Jakarta, Januari 2020).

- 2) The implementation of the said function is conducted by Sea and Coast Guard
- 3) Sea and Coast Guard envisages in paragraph (2) is formed by and responsible to the President and technically established by the Minister.

Article 281 of the same Act clearly provides that the establishment of the Sea and Coast Guard as envisages in Article 276 will be further regulated by Government Regulation. While until now there is no Government Regulation which establish such agency, KPLP emerges as the agency which was referred by Article 276. The question emerges was whether the establishment of new agency as envisages in Article 276 is needed or whether existing KPLP will be given broaden authority? The difference between the agency envisages in Article 276 and KPLP is obvious as the Sea and Coast Guard clearly function as providing both safety as well as security at sea while the existing KPLP only provides safety at sea. Article 277 and 278 of Navigation Act clearly shows overlaps of function as well as authority with the function and authority of *Bakamla*.⁴⁶ Both agencies have the scope in providing safety as well as security at sea in relation to both policies formulation as well as implementation. Both agencies also have monitoring, control and patrol function. Although both Act were silent on the which part of the sea both agencies may operate their function. At this point, it is unfortunate that the formulation of Ocean Affairs Act did not take Navigation Act as one of its consideration. As mentioned earlier that the authority of an agency is given based on the task and function of the agency. Thus, the authority of the Sea and Coast Guard should be referred to its task and function as envisages in Article 276 and 277 of the Act. In fact the authority of the Sea and Coast Guard as envisages in Article 278 is broader than the authority of *Bakamla*, since Article 278 paragraph (1) (d) clearly stated the authority of the Sea and Coast Guard includes investigator at sea. This is in accordance with its law enforcement function as mentioned in Article 276. This was what lacking in Ocean Affairs Act in relation to the function and authority of *Bakamla*.

VI. OVERLAPPING NORMS AND SOLUTION OFFERED

From the above analyses and discussions, it can be noticed that there are overlapping norms in providing both maritime security and safety. While the threats to maritime security and safety were actually different, there are two agency (other than Indonesian Navy), which were the focus of this paper, who have similar and even almost the same authority. in addition to this, such

⁴⁶ Read further Article 277 and 278 of Navigation Act,

authority were provided under different laws.⁴⁷ To gain clear understanding of such overlapping norms, the following table compares relevant articles of both laws.

Table 1. Comparison between Ocean Affairs Act and Navigation Act

	Ocean Affairs Act (<i>Bakamla</i>)	Navigation Act (Sea and Coast Guard)
Purpose of establishment	Article 59 paragraph (3): In relation to law enforcement over Indonesian waters and its jurisdiction, especially in conducting security and safety patrol over Indonesian waters and its jurisdiction, <i>Bakamla</i> is established	Article 276 paragraph (1) and (2): (1) In guarantee the establishment of maritime security and safety, guarding and law enforcement function is conducted (2) The implementation of the function envisaged in paragraph (1) is conducted by Sea and Coast Guard

⁴⁷ Indonesia. *Undang-Undang tentang Kelautan*, UU No. 32 Tahun 2014. (*Law on Maritime Affairs*, UU No. 32 Year 2014), and *Undang-Undang tentang Pelayaran*, UU No. 17 Tahun 2008. (*Law on Sea Voyage*, UU No. 17 Year 2008).

Task	<p>Article 61:</p> <p>The task of <i>Bakamla</i> includes maritime security and safety patrol over Indonesian waters and its jurisdiction</p>	<p>Article 277 paragraph (1)</p> <ul style="list-style-type: none">• Conducting monitoring of maritime security and safety• Conducting monitoring, prevention acts as well as necessary measures in relation to marine pollution• Monitoring ships traffic and activities• Monitoring salvage and other underwater activities as well as exploration and exploitation of natural resources• Securing navigational aid facilities• Supporting search and rescue activities at sea <p>Article 276 paragraph (2) also include the coordinating task of Sea and Coast Guard in relation to policies formulation as well as standard operation procedures in law enforcement at sea</p>
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Function	<p>Article 62 the function of <i>Bakamla</i>:</p> <ul style="list-style-type: none"> • Formulating national policies in maritime security and safety over Indonesian waters and its jurisdiction • Establishing early warning system in relation to maritime security and safety over Indonesian waters and its jurisdiction • Conducting safeguarding, monitoring, prevention and taking necessary action against any law infringements over Indonesian waters and its jurisdiction • Synergizing and monitoring the implementation of sea patrol of relevant institution • Giving technical and operational support to relevant institution • Giving assistance in search and rescue over Indonesian waters and jurisdiction • Conducting other tasks relating to national defense system 	<p>Article 276 paragraph (1):</p> <p>Law enforcement and safeguarding maritime security and safety</p>
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Authority	Article 63 paragraph (1) <ul style="list-style-type: none">• Conducting hot-pursuit• Suspending, inspecting, arresting and handling over the ships to the relevant authorities to carry out further legal proceedings; and• Integrating information system on maritime security and safety over Indonesian waters and jurisdiction	Article 278: <ul style="list-style-type: none">(1) Sea and Coast Guard having the authority to:<ul style="list-style-type: none">(a) Conducting sea patrol(b) Conducting hot-pursuit(c) Stopping and checking transiting ships(d) Conducting investigation(2) In establishing such authorities, Sea and Coast Guard also given the task as state civilian investigator(3) Further provisions on the authority of Sea and Coast Guard will be regulated by Government Regulation
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It can be seen from the table that while the tasks and functions of both *Bakamla* and Sea and Coast Guard mostly overlapping each other, there are actually task and authority of sea and coast guard, which do not exist in *Bakamla*. These include coordinating task of sea and coast guard in relation to policies formulation as well as standard operation procedures in law enforcement at sea; and the function of sea and coast guard as investigator.

Furthermore, in deciding to what extend the authority of agencies in relation to law enforcement, one should consider maritime zones envisages in UNCLOS 1982 and the extend of rights and obligations. As mention at the beginning of this paper that the further the ocean space is from the coast, the authority of coastal state will be lessened. This is due to the existence of other states' rights over such ocean space. In addition to this, both Ocean Affairs Act and Navigation Act do not distinguish the area of operation of both agencies. Those laws were also not considered the different scope of security and safety. Although security and safety should be developed in synergy, the scope is different each other. From the analyses presented above, it can be concluded that Sea and Coast Guard provided in Navigation Act is different from

KPLP. While KPLP concerns more in the aspect of maritime safety, the Sea and Coast Guard also includes security aspect. However, the Sea and Coast Guard is put under the Ministry of Transportation which according to Government Regulation Number 40 Year 2015, acting as administrative government in International Maritime Organization (IMO). Whereas the main purpose of IMO deals mostly with safety of navigation. This way, there is a chaos in such institutional structures. The question emerging now is whether Indonesia will establish another institution as Sea and Coast Guard or specify the authority of KPLP and *Bakamla*, or merging KPLP and *Bakamla* into single agency as *Bakamla*. This way, both Ocean Affairs Act and Navigation Act should be revisited and revised. Furthermore, if Article 276 of Navigational Act continues to exist, then the term ‘sea’ in the terminology of ‘sea and coast guard’ should be deleted, since the sea refers to various maritime zones with various degree of coastal state’s authorities. This way, leaving the term of only Coast Guard. In sum, it is submitted that this paper proposes some alternatives, which include merging KPLP and *Bakamla* into one single agency, which is *Bakamla* and consider *Bakamla* as Indonesian Coast Guard; or both *Bakamla* and KPLP are still maintained and distinguish the scope of operation. KPLP for maritime safety only, whereas *Bakamla* for maritime security only.

In addition to this, it is submitted that whatever the form of the agency will be, the area of operation should be limited to Indonesian waters only⁴⁸ and exclude Indonesian jurisdiction. As for Indonesian jurisdiction, that is beyond territorial sea, only Indonesian Navy can have the function of law enforcement. This is because in such ocean space, the rights of other States are greater than that over Indonesian waters.

VII. CONCLUSION

While UNCLOS 1982 provides various maritime zones under the sovereignty and sovereign rights of coastal states, it gives coastal states the authority to establish the laws in relation to law enforcement. It is submitted that beside Indonesian Navy, there are in fact various agencies having the authority of law enforcement at sea according to the function of the agencies. The more the merrier jargon should have been guaranteed measures on maritime security and safety in Indonesia. However, unfortunately, various law enforcement agencies lead to the difficulties in law implementation itself. Among other institutions, there are two institutions under two different laws having similar tasks, function as well as authorities. While Sea and Coast Guard provided by Navigation Act has not been established yet, the existing KPLP emerged as

⁴⁸ Indonesian waters include internal waters, archipelagic waters and territorial waters only.

possible agency having the authority of the Sea and Coast Guard. This way, making both agencies that is KPLP and *Bakamla* are compared and this research finds overlapping norms.

It is submitted that this paper offers alternatives in the form of the agencies, which include merging KPLP and *Bakamla* into one single agency, which is *Bakamla* and considered *Bakamla* as Indonesian Coast Guard; or both *Bakamla* and KPLP are still maintained and distinguish the scope of operation. KPLP for maritime safety only, whereas *Bakamla* for maritime security only. However, this paper does not propose establishing new agency, as the establishment of new agency will be costly and time consuming.

In sum, whatever the form of the agency will be, one thing is for sure, that both Ocean Affairs Act and Navigation Act should be re-visited and revised to clarifies the overlapping norms.

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